(2)

Supreme Court, U.S.
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No. 00-475

In The

Supreme Court of the United States

DANIEL P. DORGAN,

Petitioner,

vs.

SPRINT/UNITED MANAGEMENT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Was it error for the Court of Appeals to affirm the decision of the District Court to dismiss Petitioner's Amended Complaint, which Petitioner filed after he had filed a Fed. R. Civ. P. 41(a)(1) Notice of Dismissal?

II. Was it error for the Court of Appeals to affirm the District Court's decision to adopt the Magistrate's Report and Recommendation that Petitioner's motion to transfer under 28 U.S.C. § 1406(a) be denied on the ground that Petitioner had asserted proper venue in his Amended Complaint?

CORPORATE DISCLOSURE STATEMENT

Respondent Sprint/United Management Company is a wholly-owned subsidiary of Sprint Corporation, a publicly traded company.

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BRIEF IN OPPOSITION

Respondent Sprint/United Management Company ("Sprint") respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the Eighth Circuit's *per curiam* decision, affirming the dismissal of Petitioner's action on statute of limitations grounds. First, Petitioner abandoned his Rule 41(a) claim in the trial court. In addition, Rule 41(a)(1) only permits a voluntary dismissal *before* service of an answer or motion for summary judgment. Petitioner filed a notice of dismissal *after* Respondent served a motion for summary judgment. Second, 28 U.S.C. § 1406 does not authorize transfer of venue solely to avoid the bar of an applicable statute of limitations. There are no decisions by the Court, the Eighth Circuit or other courts that conflict with the Eighth Circuit's decision. Because precedent is clear and does not cause confusion, the petition should be denied.

STATEMENT OF THE CASE

A. Factual Background.

Sprint is a telecommunications company headquartered in Westwood, Kansas. Petitioner was a sales management employee in Sprint's Minnesota office. As part of his pay package, Petitioner was eligible to earn incentive compensation based upon generated revenue. Payments were calculated based on an incentive compensation plan distributed to Petitioner in the ordinary course of his management duties for Sprint. Disputing the amounts paid in 1993, Petitioner filed this action in

September 1998. Any sum truly in controversy is only a small fraction of the amount Petitioner claims.

Thinking that Minnesota's six-year contract statute of limitations governed his claims, Petitioner filed suit in Minnesota five years after Sprint allegedly failed to pay him his claimed incentive compensation. Once Petitioner learned that his claims were barred by the applicable two-year statute of limitations, Petitioner engaged in a variety of procedural moves in an effort to avoid the bar. This case is about the procedural morass Petitioner created when he tried to avoid Minnesota's applicable two-year statute of limitations.

B. Procedural Background.

Following service of the complaint, Sprint served a Notice of Motion and Motion to Dismiss under Rule 12 or for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure. The motion requested judgment based on the applicable statute of limitations. Sprint filed with the District Court copies of the October 8, 1998 cover letter serving its motion, as required by District of Minnesota Local Rule 7.1. On November 2, 1998, Sprint's counsel informed Petitioner that the briefing schedule would commence with the service of Sprint's opening memorandum of law on Monday, November 23, 1998.

On Friday, November 20, 1998, Petitioner filed a Notice of Dismissal under Federal Rule of Civil Procedure 41(a)(1). Sprint filed an objection to the Notice as improper under the express language of Rule 41 because

Sprint had served a summary judgment motion before the Notice was filed.

By letter dated December 7, 1998, Magistrate Judge John Mason advised the parties that if they were unable to agree to the terms of an Order for Dismissal, Petitioner should proceed by way of formal motion under Federal Rule of Civil Procedure 41(a)(2). Petitioner never filed a formal motion for dismissal without prejudice and never again raised the Notice in any pleading or at any hearing in the trial court.

Instead, on December 14, 1998, Petitioner served and filed an Amended Complaint, asserting the same causes of action against Sprint, but including new allegations regarding jurisdiction and venue. In paragraph 3 of his Amended Complaint, Petitioner alleged:

> Jurisdiction is proper in this court pursuant to U.S.C. § 1332 (diversity of citizenship and amount in controversy). Jurisdiction is also proper in the state or federal courts in Jackson County, Missouri, pursuant to 28 U.S.C. § 1332 and/or the incentive compensation agreement between the parties, as further described below.

In paragraph 4 of his Amended Complaint, Petitioner alleged:

> Venue is proper in this district pursuant to 28 U.S.C. § 1391(a)(1) and (c). Venue is also proper in the state or federal courts in Jackson County, Missouri, pursuant to 28 U.S.C. § 1391(a)(1) and (2) and/or the incentive compensation agreement between the parties, as further described below.

Sprint served an Amended Notice of Motion and Motion to Dismiss under Rule 12 or for Summary Judgment under Rule 56 on December 18, 1998. Sprint requested judgment on the Amended Complaint based upon the expiration of the statute of limitations. Petitioner responded to Sprint's original motion by serving and filing a responsive memorandum on December 14, 1998, which included an affidavit from Petitioner's counsel attaching copies of page 5 of Sprint's incentive compensation plan.

On January 7, 1999, Petitioner filed a motion to transfer venue to the Western District of Missouri pursuant to 28 U.S.C. § 1404. Sprint opposed the motion on the grounds that it was an attempt to escape the statute of limitations in Minnesota. Petitioner changed the statutory basis for his motion to 28 U.S.C. § 1406 and Magistrate Judge Mason allowed supplemental briefing as to the propriety of a transfer under that provision.

Oral argument on the cross-motions was heard on January 20, 1999. Magistrate Judge Mason also took under advisement an oral motion by Petitioner to dismiss the case without prejudice under Rule 41(a)(2).

On April 6, 1999, Magistrate Judge Mason issued a Report and Recommendation, in which he recommended that Petitioner's motion to dismiss under Rule 41(a)(2) be granted on the condition that Petitioner pay attorney's fees and costs. Magistrate Mason further recommended that Sprint's motion for summary judgment and Petitioner's motion to transfer venue be denied. Magistrate Mason found that Petitioner's Amended Complaint did not support his motion. He noted that in the Amended

Complaint, Petitioner "alleged that venue was proper in Missouri, but also in Minnesota." (Rpt. and Recommendation at p. 5). He further found that the "materials filed by Plaintiff in support of the motion also do not substantiate Plaintiff's current claim that venue is improper in Minnesota." (Rpt. and Recommendation at p. 5).

Sprint objected to the Report and Recommendation on the grounds that Petitioner's claims were barred by the applicable two-year statute of limitations and that dismissal under Rule 41(a)(2) would prejudice Sprint's defense. Petitioner lodged no separate objections to the Report and Recommendation, raising no issue regarding any of the Magistrate's rulings. On May 12, 1999, District Court Judge David Doty granted Sprint's motion and denied Petitioner's motion for dismissal under Rule 41(a)(2). Judge Doty also denied Petitioner's motion for a transfer of venue under 28 U.S.C. § 1406.

Petitioner appealed the District Court's judgment to the Eighth Circuit, which affirmed the judgment *per curiam* on May 18, 2000. The Eighth Circuit denied Petitioner's petition for rehearing and rehearing en banc on June 28, 2000.

REASONS FOR DENYING THE PETITION

I. THE EIGHTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL.

Petitioner only belatedly decided to rely on Rule 41(a)(1) as a means to avoid dismissal based on the statute of limitations. In the trial court he never raised the issue of the Notice of Dismissal after the Magistrate ruled

that he could proceed under Rule 41(a)(2). Most significantly, Petitioner specifically acknowledged the District Court's jurisdiction in his Amended Complaint, which he filed almost a month after he filed the Notice of Dismissal. With the Amended Complaint, Petitioner submitted himself to the District Court's jurisdiction, thus abandoning any argument that the District Court lacked jurisdiction after the Notice of Dismissal was filed.

Further, after he served and filed his Amended Complaint, he invoked the District Court's authority by responding to Sprint's motion for summary judgment and by seeking an order transferring venue pursuant to 28 U.S.C. § 1404 and then 28 U.S.C. § 1406 and never raising the issue of the Notice. By his actions, Petitioner effectively abandoned the Notice in the trial court, which precluded him from resurrecting it on appeal. *See, e.g., Nelson v. J.C. Penney Co.*, 75 F.3d 343, 348 (8th Cir.), *cert. denied*, 519 U.S. 813 (1996); *In re Control Data Corp. Sec. Litig.*, 933 F.2d 616, 622 (8th Cir. 1991); *Nat'l Assoc. of Gov't Employees v. City Public Serv. Bd. of San Antonio, Texas*, 40 F.3d 698, 706 (5th Cir. 1994). Petitioner's service and filing of an Amended Complaint, subsequent to the service and filing of his Notice of Dismissal is dispositive of the issue of the effect of Petitioner's Rule 41(a)(1) Notice of Dismissal on the District Court's jurisdiction.

Nor was the Notice of Dismissal successful on its own to dismiss the case. Rule 41(a)(1) limits a plaintiff's ability to dismiss an action. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 394 (1990). A plaintiff's right to dismiss a case under Rule 41(a)(1) ends when a defendant has served an answer or a motion for summary judgment. *Id.*

A defendant actively engaged in defending a claim on the merits makes a unilateral dismissal prejudicial. *Safeguard Business Systems, Inc. v. Hoeffel*, 907 F.2d 861, 863 (8th Cir. 1990). ("We have held that Rule 41 is designed to 'fix the point at which the resources of the court and the defendant are so committed that dismissal without preclusive consequences can no longer be had as of right.' "), *Exxon Corp. v. Maryland Casualty Co.*, 599 F.2d 659, 662 (5th Cir. 1979) (after defendant has become "actively engaged in the defense," suit cannot be terminated without consent, court permission, or dismissal with prejudice).

Sprint titled its motion "Notice of Motion and Motion to Dismiss Pursuant to Rule 12 or for Summary Judgment Under Rule 56." Sprint clearly sought a final adjudication on the merits, based on the affirmative defense that Petitioner's claims were barred by the statute of limitations. Sprint's motion engaged Petitioner on the merits and requested a final judgment on the facts and law that Petitioner's claims were stale.

More importantly, Petitioner responded to Sprint's motion,[1] appending to his response copies of the choice of law provisions from the incentive compensation agreement he had sought to have the District Court consider. A motion to dismiss pursuant to Rule 12(b)(6) is treated as a motion for summary judgment when matters outside the pleadings are presented and not excluded by the trial court. *Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir. 1992);

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[1] Petitioner's response to Sprint's motion is another indication that Petitioner abandoned his position that the District Court had no jurisdiction to hear the motion.

Kurkowski v. Volcker, 819 F.2d 201, 203 (8th Cir. 1987). Throughout the proceedings in the District Court, Sprint had a pending summary judgment motion. The decisions are consistent in holding that a Rule 41(a)(1) notice is ineffective when a summary judgment motion is pending. *See, e.g., Hamm v. Rhone-Poulenc Rorer Pharm., Inc.*, 187 F.3d 941, 948 (8th Cir. 1999) (statements of plaintiffs' counsel at oral argument raising new facts not alleged in pleadings constituted "matters outside the pleadings"), *cert. denied*, 120 S. Ct. 937 (2000); *Yosef v. Passmaquoddy Tribe*, 876 F.2d 283, 286 (2d Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990) (exhibit appended by plaintiff in response to statute of limitations argument not excluded by court and Rule 12(b)(6) motion converted to one for summary judgment).

Consequently, contrary to Petitioner's position, the circuit courts have not interpreted Rules 12, 56, and 41 inconsistently. Rather, as here, where a plaintiff has either abandoned a position or a motion for summary judgment is pending, the right to dismiss pursuant to Rule 41(a)(1) is terminated.

II. THE EIGHTH CIRCUIT PROPERLY UPHELD THE DISTRICT COURT'S DECISION DENYING PETITIONER'S MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1406(a).

When a case is filed in a venue other than that specified in a contract, a forum selection clause is a significant factor "that figures centrally in the district court's calculus" when considering a motion to transfer under 28 U.S.C. § 1404(a). *Stewart Organization, Inc. v.*

Ricoh Corp., 487 U.S. 22 (1988). Section 1406 does not apply to the analysis of a forum selection clause where venue is proper in the transferor court. *Id.* at 28 n.8.

Since *Ricoh*, motions to transfer involving a forum selection clause have been analyzed under § 1404. *See, e.g., Terra Int'l v. Mississippi Chem. Corp.*, 119 F.3d 688 (8th Cir.) (analyzing effect of forum selection clause on transfer issue under § 1404(a), *cert. denied*, 522 U.S. 1029 (1997)); *Crescent Int'l Inc. v. Avatar Communities, Inc.*, 857 F.2d 943, 944 (3d Cir. 1988) ("[I]n *Ricoh*, the Court said that Section 1406 does not apply when, as here, venue is proper."). Under § 1404(a), in the event of a transfer, the law of the transferor court applies. *Wisland v. Admiral Beverage Co.*, 119 F.3d 733, 735 (8th Cir. 1997), *cert. denied*, 522 U.S. 1112 (1998).

In his Amended Complaint, Petitioner asserted that venue was proper in Minnesota or Missouri. Because his claim would be barred under the Minnesota statute of limitations, Petitioner sought an order transferring the case to Missouri pursuant to § 1404. Realizing that the two-year Minnesota statute of limitations would apply even if the case were transferred, Petitioner then resorted to § 1406 to evade the otherwise inevitable dismissal of his lawsuit.

Courts have repeatedly rejected motions to transfer by plaintiffs "whose own failure to pursue its claim diligently and to research [the forum's] statute of limitations resulted in a procedural bar." *Spar, Inc. v. Information Resources, Inc.*, 956 F.2d 392, 393-94 (2d Cir. 1992); *see also Cote v. Wadel*, 796 F.2d 981, 985 (7th Cir. 1986). In *Spar*, the plaintiff moved for a § 1406 transfer from the Southern

District of New York to the Northern District of Illinois. Although venue was otherwise proper in New York, the plaintiff argued that "Illinois's longer limitations period would enable [plaintiff] to pursue the action on the merits." 956 F.2d at 392. The court concluded, however, that the plaintiff's "own failure to pursue its claim diligently" was not a proper basis for a § 1406 transfer. *Id.* The court unequivocally rejected what it characterized as the plaintiff's obvious attempt to forum shop, or "bargain hunt" for a better venue, under the guise of a § 1406 transfer. *Id.* at 395. Similarly, Petitioner's motion was rejected in this case.

Petitioner incorrectly suggests that merely because the Eighth Circuit did not enforce the forum selection clause, its decision in this case contradicts its previous decision in *M.B. Restaurants, Inc.* v. *CKE Restaurants, Inc.*, 183 F.3d 750 (8th Cir. 1999). The issue in *M.B. Restaurants* was whether the forum selection clause was invalid for fraud. *Id.* at 752. The Eighth Circuit affirmed the district court's order, dismissing the case based on the forum selection clause, holding that the allegations of fraud were insufficient to overcome a presumption of validity. *Id.* at 753. By contrast, in this case, Petitioner, having chosen the forum in which to prosecute his action, later sought to enforce the forum selection clause to avoid dismissal under the applicable statute of limitations. The decision in *M.B. Restaurants* in no way contradicts the decision to deny Petitioner's motion in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

October 26, 2000

Respectfully submitted,

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